IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN THE MATTER OF THE ESTATE OF ROBERT D. ARMSTRONG, Deceased.	)	PROBATE NO. SX-14-PB-71

MOTION TO STAY HEARING PENDING DISCOVERY

Douglas L. Armstrong moves to stay all hearings concerning the admission of the Will of Robert D. Armstrong to probate and the appointment of administrator pending discovery.[1] As there are no assets currently in need of administration and Petitioner's only purpose of probating the Will is to elect against it, Douglas Armstrong requests that the Court provide all parties the opportunity to conduct discovery necessary to prepare for hearings the following issues: (1) whether Patricia Armstrong has priority as a spouse given the passage of nine (9) years since the death of Robert D. Armstrong; (2) whether Patricia Armstrong is a proper Administrator pursuant to 15 V.I.C. § 237; (3) whether Patricia Armstrong is qualified to administer, in the interim, assets which she wishes to invade in making a statutory election; and (4) whether Patricia Armstrong is precluded from electing against the will under any theory of laches, waiver or estoppel, given that she has waited nine years to seek such an election

[1] Contemporaneously with the filing of this motion, Douglas Armstrong has also moved to disqualify Attorney Hamm and to stay all proceedings in this case with the sole exception of discovery related to such disqualification. It is respectfully submitted that the motion to disqualify should have first priority, as is more fully discussed in that motion.

and her children have acted in justified reliance on her failure to seek an election for nearly a decade.

As the Supreme Court has noted, "[d]iscovery . . . is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant." *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 391-92, 91 L. Ed. 451 (1947). Discovery is also permissible in contested probate matters. *See, e.g., In re Kvasauskas' Estate*, 5 Ill. App. 3d 202, 204, 282 N.E.2d 465, 466 (1972), (once a party contests the will "the full panoply of discovery tools is available and should be utilized by a litigant."); *In re Falk's Estate*, 247 So. 2d 485, 487 (Fla. Dist. Ct. App. 1971) ("where "the answers sought to be discovered are all clearly relevant to the petitioners' case and can be answered with little or no additional expenses to either party, . . . they are valid fruits of the discovery process."); *In re Estes' Estate*, 158 So. 2d 794, 796 (Fla. Dist. Ct. App. 1963) ("the rules of civil procedure [pertaining to]. . . discovery are available to the parties to a will contest which is filed and litigated by statutory direction within the confines of a probate proceeding."); *In re Rauh's Estate*, 156 N.Y.S.2d 862, 863 (Sur. 1952) (allowing contestants to "examine proponent in this probate proceeding and to compel discovery and inspection of correspondence, memoranda, hospital records and other documents in connection with such examination . . . .").

In this case, there are several issues which must be actively litigated and will require discovery. Two key issues are whether Patricia Armstrong has priority as

Administrator or whether she is qualified under section 15 V.I.C. § 237. While a spouse of a decedent generally has priority over others as candidate for Administrator of an estate, such is not the case when a widow fails to file her claim within thirty days of her husband's death. *In re Estate of DeChabert*, 43 V.I. 27, 2000 WL 1515175, at * (Aug. 24, 2000) (citing 15. V.I.C. § 237; I 31 V.I. 3 (Terr.Ct.1994)). In such case, the widow loses her priority and "is on equal footing with any other candidate." *Id.* (citing *In re Estate of Ledee* 37 V.I. 37, 40 (Terr.Ct.1997)). Moreover, § 237 only provides priority where the proposed administrator is "qualified and competent for the trust" and precludes such appointment where the decedent "has made some testamentary disposition of [his] property which renders it necessary and property to grant the administration to some other person." Mrs. Armstrong, in filing her petition for probate nine years after the death of her spouse, has exceeded the thirty-day period within which she may have claimed priority for administration of the Estate (even discounting the fact that her children, not her, were named the Personal Representatives of the Estate in the Will). In addition, as the trust she seeks to elect against consisted of several business entities which have long been operated by her children, discovery is needed to determine Mrs. Armstrong's qualifications to administer these businesses in the process of making a statutory election. Additionally, her stated intention to elect against the "testamentary disposition[s]" of her deceased husband, may render it "necessary and proper" to grant the administration to some other person under § 237.

In addition to the statutory impediments to appointing Mrs. Armstrong Administrator, there are also defenses and remedies in equity that may preclude her from making a statutory election (without which the admission of the Will to probate is moot), including laches, waiver and estoppel.

As shown by the attached declaration of Douglas Armstrong, Mrs. Armstrong was fully aware of the provisions of the Trust and the Will and her conduct during the nine years since her husband's death show that she accepted all benefits of the Trust and Will and made no effort to contravene her husband's testamentary intent. Furthermore, she was aware that her children, as both trustees and beneficiaries, were transacting business and administering trust assets in reasonable reliance upon the validity and inviolability of their father's testamentary intent.[2] Similarly, Mrs. Armstrong made no objection when Douglas Armstrong and his siblings succeeded as Trustees of the Armstrong Family Trust ("AFT"), successor to the RDA Living Trust after Robert Armstrong's death.[3] Again, Mrs. Armstrong made no objection when Douglas Armstrong and his siblings administered the Patty Armstrong Trust" ("PLAT"), a trust created by the AFT for the support and maintenance of Patricia L. Armstrong.[4] Mrs. Armstrong has always received and accepted the entire income of PLAT and distributions of principal when appropriate. Patricia L. Armstrong, has,

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[2] Declaration of Douglas L. Armstrong ("Declaration") ¶ 8.
[3] Id. at ¶ 9.
[4] Id. at ¶ 9.

continuously since Robert Armstrong's death, enjoyed the possession of the Armstrong family's residential estate at Estates Bulows Minde, and Hafensight, property that has been maintained by the AFT and its successors.[5] Likewise, Mrs. Armstrong was aware of and did not object to the decanting of the AFT and the distribution of the assets among her children in 2009 and 2011.[6] In sum, not only has Patricia Armstrong failed to object to the creation and administration of the AFT or the PLAT or to elect her statutory share within a reasonable time following her husband's death, she has continuously benefitted from the decedent's intentional dispositions by occupying the family Estates at Bulows Minde and Hafensight and by accepting income and principal from the PLAT. In reliance on Mrs. Armstrong's apparent acquiescence in her husband's estate plan, Douglas Armstrong has performed or consented to the following transactions:

a. Invasion of PLAT principal;

b. The construction of a $1,000,000 residence in Estate Hafensight for Mrs. Armstrong's sole benefit, paid for by the invasion of PLAT principal;

c. The purchase of an Ashville condominium unit costing over $400,000 for Mrs. Armstrong - again by invasion of PLAT principal;

d. The division of AFT assets as accomplished in the 2009 Transaction;

e. The division of joint trust assets as accomplished in the 2011 Transaction; and

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[5] Id. at ¶¶ 6, 7, and 13.
[6] Id. at ¶¶ 17-19.

f. Becoming the sole family Trustee of PLAT (i.e., the only child having responsibility for managing PLAT assets for his mother's benefit) and its sole residual beneficiary (i.e., the only child to whom the remaining corpus would be distributed upon trust dissolution).[7]

These facts support equitable claims and defenses which may preclude Mrs. Armstrong from electing a statutory share under theories of estoppel, waiver or laches. A full hearing on these matters is warranted, and no hearing can be held until the parties are allowed the opportunity to conduct full discovery.

Some courts have held that the actions of a spouse, such as those enumerated above may constitute an election under the will. *See Long v. Darks*, 1938 OK 451, 184 Okla. 449, 87 P.2d 972, 976 (Supreme Ct. Okl. 1939) (Election "may be inferred from the acts of the surviving spouse. . . ."). Moreover, such acts are binding when they "prevent restoring the parties affected to the same situation as if such acts had not been performed." *Id.* at 976. (citations omitted). In *Longs*, the court found there was ample evidence that the surviving spouse elected to take under the provision of the will and that these actions were binding. The court noted that "all the parties, relying upon the validity of the bequests and upon plaintiff's acquiescence therein, have accepted and probably disposed of certain property received." Such apportionment was "beyond recall of the court." Given these facts and that there was no evidence that the election to take under the will "was not the result of intelligent and discriminating choice with full

[7] Id. at pp 6, 13, 14, 17, 18, 20.

knowledge of the facts," the appellate court determined that the plaintiff in Longs was estopped from exercising her right to assert her statutory share. Other cases where a widow was estopped from seeking her statutory share include *Joseph Loria v. Stanton Co.* (1921) 115 Misc. 640, 645 190 N.Y. Supp. 131 (NY Supreme Ct. 1921) (where the widow accepted for a number of years, without making any claim of the dower right in the real estate, the income from trust funds provided by her deceased husband's will widow had no right to set up a claim of dower); *Koezly v. Koezly*, 31 Misc. 397, 402, 65 N.Y.S. 613, 616 (Sup. Ct. 1900) (where widow lived in the house and occupied a flat continuously since the death of the testator, as provided for by the terms of the will, widow was deemed to have made her election to accept the provisions contained in the will in lieu of dower); *In re Aitken's Will*, 117 Misc. 268, 272, 192 N.Y.S. 270, 272 (Sur. 1921) ("the acceptance of the income of the trust created by the will of the decedent. . . . .constituted an election upon [the part of the widow] to accept its provisions . . . ."). A theory of laches may also preclude the probate of the will. For example in the case *Wilds v. Heckstall*, 93 A.D.3d 661, 664, 939 N.Y.S.2d 543 (App. Div. 2012), the plaintiff, a beneficiary under the will, attempted to invalidate a mortgage on the property devised to her by will but was precluded from doing so on a theory of laches; the plaintiff had waited almost 11 years to probate the will and failed to assert her rights under the will in a timely manner after the property was encumbered by a mortgage. The court held

that under such circumstances, the theory of laches prevailed and the mortgagee's interest in the property would remain.

Similarly, Mrs. Armstrong was aware of the creation of the AFT and PLAT, and aware of the decanting of the AFT in 2009 and 2011 and yet did not attempt to probate the will and assert any right in her statutory share until 2014, nine years after her husband's death, five years after the original decanting of the AFT and three years after the second decanting in 2011. All of these facts, bolstered and expanded by the process of discovery, may suffice to establish that Mrs. Armstrong is precluded from probating the will or electing her statutory share. Thus, Douglas Armstrong respectfully requests that the Court stay all hearings on admission of the Will to probate and the appointment of an Administrator and direct the parties to submit a joint discovery plan as contemplated by Fed. R. Civ. P. 26(f), as would be the case in any normal civil proceeding. After discovery is completed, the parties will be better able to either settle their differences or to litigate them.

Respectfully submitted,
HUNTER & COLE

Dated: January 7, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of January, 2015, I caused a true and correct copy of the foregoing to be mailed, postage pre-paid, to:

Donovan Hamm, Esq.
The Hamm Law Firm
5030 Anchor Way, Suite 5
Christiansted, VI 00802

Robert W. Armstrong
P.O. Box 26230
Christiansted, VI 00824

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2116 (53-B) Company Street
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IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

IN THE MATTER OF THE ESTATE OF ROBERT D. ARMSTRONG, Deceased.	)	PROBATE NO. SX-14-PB-71

DECLARATION OF DOUGLAS L. ARMSTRONG

1. I am the oldest son of the decedent and a named Personal Representative under his Last Will and Testament ("Will").

2. Pursuant to § 2.02 of the Will, all assets of the probate estate are to be placed in the Robert D. Armstrong Living Trust ("RDA Living Trust") dated May 16, 2005.

3. Pursuant to § 2.03 of the will, I and the other named Personal Representatives, Robert W. Armstrong and Elizabeth Anne Armstrong, are directed to establish a testamentary trust to include any existing probate assets for the named beneficiaries of the RDA Living Trust.

4. In accordance with the Will of the decedent, and pursuant to the terms and conditions of the RDA Living Trust, I along with my siblings, Robert W. Armstrong and Elizabeth Anne Armstrong, were Trustees and Beneficiaries of the Armstrong Family Trust ("AFT"), successor to the RDA Living Trust after our father's death.

5. Included among the provisions of the RDA Living Trust was the creation of a sub-trust, the "Patty Armstrong Trust" ("PLAT") for the support and maintenance of our mother, Patricia L. Armstrong. My mother has always received and accepted the entire income of PLAT and, from time to time, has received distributions of principal when needed. From its inception, the Trustees of PLAT were me and my brother and sister, Robert W. Armstrong and Elizabeth Anne Armstrong. My siblings and I were also the residuary beneficiaries of PLAT.

6. In the process of administering the PLAT, my mother asked for a monthly distribution of $15,000.00 regardless of the actual income generated by the sub-trust. As per her request, and in reliance on the validity and integrity of my father's testamentary dispositions, PLAT has made, and continues to make, those

regular distributions even when it requires the invasion of principal to do so. My mother has accepted those distributions without objection. From time to time my mother has asked for additional distributions of capital from PLAT. In nearly all instances, until the filing of adverse litigation against me and my siblings through Attorney Hamm, those requests have been honored.

7. In accordance with the provisions of the RDA Living Trust, subsequently known as AFT, my mother, Patricia L. Armstrong, has, continuously since my father's death, enjoyed the possession of my family's residential estate property at Estates Bulows Minde, and Hafensight. This property was held by the RDA Living Trust at the time of my father's death and continued under the ownership of AFT. AFT remained responsible for the maintenance and upkeep of the residential estate.

8. Based upon personal knowledge and upon documents I have read, my mother, Patricia L. Armstrong, was kept informed of my father's intentions regarding the eventual disposition of his Estate well in advance of his death and prior to the execution of the RDA Living Trust and the Will. I was present in Ashville North Carolina, together with my mother and siblings, when the RDA Living Trust and the Will were executed, and my mother made no objection to either the Trust or the Will.

9. My mother made no objections when I and my siblings succeeded as Trustees of the AFT after my father's death. Similarly, my mother made no objection when I and my siblings established the PLAT and assumed the duties as its Trustees. My mother participated in some of the meetings of the Trustees in which decisions were made regarding the administration of AFT and PLAT assets.

10. At no time since my father's death in 2005, until shortly before the filing of the instant petition, did my mother state any desire to admit the Will to probate, to seek her own appointment as Administrator of the probate estate, or to seek an elective share of my father's estate in derogation of my father's stated testamentary dispositions as reflected in both the RDA Living Trust and the Will.

11. For a substantial period following my father's death the AFT was represented by Attorney Donovan M. Hamm, Jr. The subject of these representations included, without limitation, real estate, taxation, and capital stock transactions. In the course of such representation Mr. Hamm was made aware of assets that may not have been transferred to the RDA Living Trust during my father's lifetime.

Despite such knowledge, at no time did Attorney Hamm advise me or the other Trustees/Executors that the Will ought to be admitted to probate.

12. During the nine years since my father's death I have relied upon the absolute integrity and validity of all of my father's testamentary dispositions, including the provisions of the RDA Living Trust and the provisions of the Will. At no time during his representation of the AFT and the Trustees did Attorney Hamm advise us that the continuing validity of the AFT and the integrity of my father's testamentary dispositions were in any way contingent on my mother's potential to upset my father's arrangements by exercise of any statutory election or other power.

13. Although my mother enjoyed unfettered possession of the family estate at Bulows Minde, she decided that she would prefer to have another home constructed within the estate boundaries in Estate Hafensight. In order to accommodate her wishes, and in reliance on the validity and integrity of my father's testamentary dispositions, PLAT expended nearly one million dollars of principal in the construction of the new home. My mother continues to enjoy unfettered and sole occupancy of the home that was constructed to her specifications. The construction of a new residence in Estate Hafensight was not required by the terms of the RDA Living Trust, AFT, or PLAT.

14. At my mother's specific request, PLAT purchased with principal a condominium unit in Ashville, North Carolina, at a cost of over $400,000.00 for her exclusive use. Such a purchase was not required by the terms of the RDA Living Trust, AFT, or PLAT.

15. After my father's death, disagreements arose as between my brother, Robert W. Armstrong, and my sister and I, respecting the administration of AFT assets and the distribution of income and capital to the trust beneficiaries (i.e., me and my siblings). My mother was aware of these ongoing disagreements.

16. During the period in which these disagreements arose and progressed, my mother was completely estranged from my brother. Upon information and belief, during this period, and continuing until approximately April of 2014, my mother and my brother did not communicate with one another and held each other in mutual distrust, odium, and contempt.

17. In 2009, as a result of continuing tensions between my brother on one hand and me and my sister on the other, it was decided that the assets of AFT would be divided between my brother on one hand and my sister and me on the other. This was the subject of extended negotiations and very complex transactions of corporate reorganization and conveyance requiring substantial expenditures of fees for legal and accountancy services (the "2009 Transaction"). My mother was fully advised of and made aware of the circumstances of these negotiations and transactions. In reliance upon the absolute validity and integrity of my father's testamentary dispositions, I expended substantial time and money in completing all of the transactions necessary to separate AFT assets so as to allow my brother to pursue his own business affairs separate from those of me and my sister. These transactions included, without limitation, the following salient features:

    a. Virtually all of the assets of AFT were decanted and transferred either to trusts controlled by my brother and a trust controlled by my sister and me;
    b. Certain residential real estate was distributed from AFT to both my brother and my sister;
    c. My brother retained sole control of AFT, with whatever assets then remained.
    d. The family estate at Estates Bulows Minde and Hafensight (which remained occupied by my mother as provided in the RDA Living Trust) was transferred to a trust jointly controlled by me and my sister and for which my sister and I were both Trustees and beneficiaries;
    e. My mother continued to enjoy all benefits of residing in the family residential estate, with all costs of upkeep and maintenance being assumed by the trust jointly created by me and my sister.
    f. PLAT remained undisturbed except that my brother resigned as a trustee and disclaimed all interests as a residual beneficiary of PLAT. PLAT was then administered by me and my sister as Trustees (together with an outside third Trustee), with my sister and me also being the sole residual beneficiaries. My mother continued to receive her customary distributions from PLAT without objection.

18. Unfortunately, disagreements thereafter arose between my sister and me respecting the administration of business assets held by our joint trust. There followed extensive negotiations and resulting transactions of conveyance whereby in 2011 the joint trust were decanted and the assets distributed between

my sister and me (the "2001 Transaction"). Among the salient features of this series of transactions were:

a. My sister retained sole control of the family estate at Estates Bulows Minde and Hafensight, subject to my mother's right of occupancy as established by the RDA Living Trust; and
b. I and another person were made the Trustees of PLAT, with me being the sole residual beneficiary. PLAT continued to make all customary distributions to my mother, without objection on her part until April of 2014, when she retained the services of Attorney Hamm.

19. My mother was fully aware of both the 2009 and 2011 transactions and the fact that the assets originally within the RDA Living Trust were being distributed between her three children. She made no objection to either the 2009 Transaction or the 2011 Transaction.

20. In the nine years following my father's death I reasonably assumed that the testamentary dispositions he had made via the RDA Living Trust and the Will were absolutely valid and the integrity of those dispositions were unchallenged. Had I known of my mother's intention to disturb those dispositions (by statutory election or otherwise) I would not have agreed to any of the following:

a. Invasion of PLAT principal except in instances of genuine need for my mother's support;
b. The construction of the new residence in Estate Hafensight;
c. The purchase of the Ashville condominium unit;
d. The division of AFT assets as accomplished in the 2009 Transaction;
e. The division of joint trust assets as accomplished in the 2011 Transaction; or
f. Becoming the sole family Trustee of PLAT (i.e., the only child having responsibility for managing PLAT assets for my mother's benefit) and its sole residual beneficiary (i.e., the only child to whom the remaining corpus would be distributed upon trust dissolution).

21. Despite nearly a decade of absolute estrangement, my mother and my brother appear to have reconciled in or around March of 2014. Shortly after this reconciliation my mother gave my brother unfettered power of attorney. Concurrently, commencing in April of 2014, my mother, through Attorney Hamm, began making demands and threats to both my sister and me respecting

Estates Bulows Minde and Hafensight and the control and administration of PLAT. Among those threats was that of making a statutory election against my father's testamentary dispositions and invasion of our personal trusts and their assets. Although in theory my brother's property would be similarly affected, Attorney Hamm's threats occurred more or less concurrently with veiled threats issued by my brother concerning the same general subject matter.

22. On or about August 8, 2014, my mother commenced an action in the Superior Court of the Virgin Islands, District of St. Croix, for declaratory and injunctive relief against me, my sister, my brother, and collateral family members who were contingent beneficiaries under the RDA Living Trust. I am made a defendant individually, as Trustee of the residuary beneficiary of PLAT, and as natural guardian of my three children. *Patricial Layland Armstrong v. Elizabeth Anne Armstrong, et al.*, Civ. No. SX-14-cv-280 (the "Civil Action"). My mother is represented in the Civil Action by Attorney Hamm.

23. Among the relief sought in the Civil Action are:

    a. The rescission in whole or in part of the 2009 and/or 2011 Transactions;
    b. The reconveyance of the family residential estate in Bulows Minde and Hafensight to AFT, which under the 2009 Transaction is under the exclusive control of my brother.

24. Although heretofore I have enjoyed a close relationship with my mother and communicated with her often and at length respecting PLAT matters, she has recently refused to discuss with me any of the actions taken ostensibly on her behalf by Attorney Hamm or my brother.

25. Upon information and belief, my mother's actions in filing the Civil Action and in seeking to admit the Will to probate and attempt to make a statutory election against my father's testamentary dispositions are the result of undue influence by my brother. All attempts to discuss either the Civil Action or the present petition with my mother have been rebuffed, whereas she remains in close contact and communication with my brother.

Pursuant to the provisions of Sup. Ct. R. 18, I declare under penalty of perjury under the laws of the United States Virgin Islands that the foregoing is true and correct.

Date: 1/5/2014 BY _____
Douglas L. Armstrong